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In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion, findings of fact, and conclusions of law of the district court (Appendix A, *infra*, pp. 17–24) are not yet reported.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4. The judgment of the district court (Appendix B, *infra*, p. 25) was entered on July 18, 1960, and the notice of appeal (R. 78) was filed on September 14, 1960. The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section

17 of the Act of June 25, 1948, 62 Stat. 989. The following decisions sustain the jurisdiction of this Court to review on direct appeal the order in this case insofar as it failed to adjudicate that appellee had violated the Sherman Act: *United States* v. *National Lead Co.*, 332 U.S. 319; *United States* v. *United States Gypsum Co.*, 340 U.S. 76; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.

STATUTES INVOLVED

Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4, provides in pertinent part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title; * * *

Sections 4 and 5(a) of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 15, 16(a), provide as follows:

> Section 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> Section 5(a). A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such

defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

QUESTION PRESENTED

The Government's complaint in a Sherman Act civil suit requested, *inter alia,* that the district court "adjudge and decree that the defendant has combined and conspired in restraint of the trade and commerce hereinabove described in violation of Sections 1 and 3 of the Sherman Act." The district court dismissed the complaint at the close of the Government's case, on the ground, among others, that the defendant's actions did not violate the Sherman Act. This Court reversed and remanded, holding that the Government's proof established a prima facie violation of the Sherman Act (362 U.S. 29), and that "[o]n the record before us the Government is entitled to the relief it seeks" (*id.*, at 48). On remand, the defendant submitted no evidence with respect to the substantive violations which this Court had held were established by the record as it then stood, but did introduce evidence designed to show that there was no need for an injunction. The district court entered a judgment which

merely denied the injunctive relief sought by the Government.

The only question presented by this appeal is whether, in these circumstances, the district court erred in refusing to adjudicate that the defendant had violated the Sherman Act.

STATEMENT

The underlying facts involved in this litigation are set out in this Court's opinion in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29. There this Court reversed the dismissal by the district court, after the Government had introduced its evidence, of a civil antitrust suit charging that Parke Davis had participated in a price-fixing conspiracy and combination in violation of Sections 1 and 3 of the Sherman Act. The district court had dismissed the case on the grounds that (1) Parke Davis' actions did not show an illegal price-fixing conspiracy, but merely a permissible refusal to sell to certain customers, and (2) that there was "no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated" (362 U.S. at 47). This Court, holding that the record showed that Parke Davis had gone beyond its right unilaterally to refuse to deal with customers and had "effected arrangements which violated the Sherman Act" (*id.*, at 45), and that the evidence did not support the court's findings as to the impossibility of further violations by Parke Davis (*id.*, at 48), concluded that "[o]n the record before us the Government is entitled to the relief it seeks" (*ibid.*). Ac-

cordingly, it remanded the case "with directions to enter an appropriate judgment enjoining Parke Davis from further violations of the Sherman Act unless the company elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record" (*id.*, at 48–49).

On remand, Parke Davis introduced no evidence to refute the Government's proof of violation; it did introduce evidence designed to show that there was no need for injunctive relief (June Tr. 3–30).[1] The district court ruled on July 5, 1960 that it "adheres to its original decision and finds for the Defendant and against the United States, and denies injunctive relief" (July Tr. 2–3). Pursuant to the court's direction (*ibid.*), Parke Davis then filed proposed supplemental findings and conclusions (R. 84–89) which urged that "[s]ince on the record as a whole the plaintiff is not entitled to the relief it seeks, the complaint must be dismissed" (R. 89). In accordance with the express permission of the Court (July Tr. 3), the Government then submitted objections to the proposed

[1] We refer to the transcript of the hearing on June 6, 1960 as "June Tr.", and the transcript of the hearing on July 5, 1960, as "July Tr."

The evidence Parke Davis introduced to show that injunctive relief was not necessary consisted primarily of the testimony of the Parke Davis vice president in charge of sales that the company had abandoned its price-fixing efforts independently of the Government's suit or investigation; that it had done so as a matter of business judgment, primarily because of their lack of success and the absence of similar efforts by its leading competitors (R. 62; June Tr. 12–13, 18); and that since it "would not be a practical policy", Parke Davis had "made no plans at all to reinstate such a policy" (June Tr. 18).

findings and conclusions (R. 71–77).[2] These objections stated that "[t]he conclusion of law is clear, i.e., that Parke Davis has violated Sections 1 and 3 of the Sherman Act. Consequently, the Government should have a judgment in its favor and injunctive relief should be imposed against Parke Davis" (R. 72). The Government argued further (R. 77) that:

> Defendant's second conclusion of law requests dismissal of the complaint because the Government is not entitled to relief. Defendant ignores the fact that the Supreme Court branded its activities in the District of Columbia and the State of Virginia as violations of Sections 1 and 3 of the Sherman Act. The Government submits that it is entitled to a judgment in its favor, whether or not injunctive relief is granted.

The same view had been expressed in the Government's Reply Memorandum on Relief (R. 26–34), filed prior to the court's decision on July 5, 1960, which stated (R. 34):

> The Government respectfully submits therefore that judgment should be had against

[2] While Government counsel had advised the court of its intention to file these objections after receipt of a copy of defendant's proposed findings, and the court had indicated it would receive them, they were not presented to the court until July 19, 1960. When the Government presented them, it was not aware that the court had mailed its opinion to counsel on the previous evening (see R. 95–96). Later the same day the judge advised Government counsel that he "had carefully considered" the Government's objections, but that "they made absolutely no difference in his mind, and that he did not intend to change his Opinion as a result of them" (*ibid.*).

> Parke, Davis and that the injunctive relief called for by the complaint be granted.

On July 18, 1960, the court entered its opinion, findings and conclusions (Appendix A, *infra,* pp. 17–24), and its order (Appendix B, *infra,* p. 25). The court stated (*infra,* p. 17) that "the present hearing relates solely to the question of injunctive relief," and its opinion and findings dealt solely with that issue. The order, after reciting that the court had "heard the evidence on the issue of relief," had "reviewed the entire record," had considered the briefs and had concluded that, "upon the facts and the law, the Plaintiff is not entitled to the relief it seeks," merely stated:

> ORDERED that the injunctive relief sought by the Plaintiff is denied.

THE QUESTION IS SUBSTANTIAL

In the previous appeal in this case, this Court, after holding that the facts found by the trial court established a violation of Section 1 of the Sherman Act, concluded (362 U.S. 29, 48) that "[o]n the record before us the Government is entitled to the relief it seeks". The relief sought in the Government's complaint included the request that "the Court adjudge and decree that the defendant has combined and conspired in restraint of the trade and commerce hereinabove described in violation of Sections 1 and 3 of the Sherman Act" (Record, No. 20, Oct. Term, 1959, p. 7). On remand, Parke Davis introduced no evidence on the question of violation. This appeal

presents the question whether, on the same record on which this Court had already held that violation was established, the trial court could refuse to enter an adjudication of violation, as requested in the complaint and as further urged on remand,[3] because it was of the view that "the injunctive relief sought by the Government would be unnecessary and inappropriate" (R. 65).[4]

The question is an important one in the administration of the antitrust laws. The decision below holds in effect that the Government is not entitled to an adjudication of violation, even though such violation is concededly established by the record, solely because the court deems injunctive relief inappropriate. This ruling, if allowed to stand, would not only seriously weaken the efficacy of Section 5(a) of the Clayton Act as an important tool of antitrust enforcement, but would also weaken the effectiveness of the Government's own suit in preventing and re-

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[3] See Statement, *supra*, pp. 6–7. Prior to the trial court's decision not to grant injunctive relief, the Government had urged that "judgment should be had against Parke Davis *and* that the injunctive relief * * * be granted" (R. 34, emphasis added). The same view was repeated in the Government's objections to Parke Davis' proposed findings and conclusions (R. 72), and the Government there also explicitly stated that "it is entitled to a judgment in its favor, whether or not injunctive relief is granted" (R. 77). While the district court had entered its opinion, findings and judgment the day before it received these objections, the court subsequently considered them but declined to change its decision (see note 2, *supra*, p. 6). Thus, the court in effect treated the objections as a request for reconsideration, which it considered and denied.

[4] The Government is not challenging, on this appeal, the trial court's denial of injunctive relief.

straining violations of the antitrust laws. We believe that Congress has imposed on the district court the duty, when the record in a Government antitrust suit establishes a violation of the antitrust laws, to adjudicate that violation, whether or not the court also grants injunctive relief. In the instant case, the duty of the court below to adjudicate violation was particularly clear, since (1) this Court had previously held that the record established violation, (2) Parke Davis introduced no further evidence on violation, and (3) the court below itself recognized that "the present hearing relates solely to the question of injunctive relief" (Appendix A, *infra*, p. 17).

1. Section 5(a) of the Clayton Act, 15 U.S.C. 16(a) (*supra*, pp. 2–3), makes any "final judgment or decree" entered in any civil or criminal antitrust action brought by the United States "to the effect that a defendant has violated said laws" prima facie evidence, in any private antitrust suit against the defendant, that the defendant had committed the violation thus adjudged.[5] This provision "reflect[s] a purpose to minimize the burdens of litigation for injured private suitors by making available to them *all matters previously established* by the Government in antitrust actions". *Emich Motors* v. *General Motors*, 340 U.S. 558, 568 (emphasis added); see *Radovich* v. *National Football League*, 352 U.S. 445, 454. It was added to the law in 1914 because of recognition that, due to the

[5] This provision is explicitly made not applicable to consent judgments entered before any testimony has been taken, and to decrees in suits for damages brought by the United States under 15 U.S.C. 15a.

difficult problems of proof in antitrust cases, the mere grant of the right to sue for treble damages did not adequately protect the rights of persons who had been injured by violations of the antitrust laws. See, *e.g.*, *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55, 63. It stemmed from a request by President Wilson to give "private individuals who claim to have been injured * * * the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has * * * sued the combinations complained of and won its suit * * *. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience." 51 Cong. Rec. 1964.

Section 5(a) of the Clayton Act was thus designed to make more effective the enforcement scheme of the Sherman Act. See, also, H. Rep. No. 627, 63d Cong., 2d Sess. 14; S. Rep. No. 698, 63d Cong., 2d Sess. 45; 51 Cong. Rec. 9270, 9490, 13851. Since its enactment in 1890, the Sherman Act has provided not only for civil and criminal suits by the Government, but also for damage and injunction suits by injured private parties. The latter suit is an important element of effective antitrust enforcement. "It is clear Congress intended to use private self-interest as a means of enforcement * * * when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee." *Bruce's Juices* v. *American Can Company*, 330 U.S. 743, 751–752. See *Wilder Mfg. Co. v. Corn Prod-*

ucts Co., 236 U.S. 165, 174; *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp 167, 171 (S.D.N.Y.).

The decision below, however, would seriously weaken the Congressional plan of making the private suit an important part of antitrust enforcement. For despite the clear Congressional "purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors v. General Motors, supra*), a private suitor would have that benefit only if the trial court held that injunctive relief was necessary. Thus, no matter how lengthy the trial, how complex the issues, and how extensive and clear the Government's proof of violation may be, a private plaintiff who has suffered great injury from these proven violations would have to relitigate the question of violation in his own case. Placing such an unwarranted burden on the private party would inevitably weaken the effectiveness of the private damage action, and would thus thwart the Congressional policy to facilitate redress through such suits. It would also impose on the courts the unnecessary burden of relitigating issues that had already been fully canvassed in the prior government suit.

2. An adjudication of violation by the trial court is not limited in its effect to private actions; it also affects government litigation. In the first place, since 1955 (see 69 Stat. 283) the Government has been authorized to maintain its own antitrust suit for damages

(15 U.S.C. 15a), and in such suit it can rely upon the judgment in its prior equity or criminal action as prima facie evidence of the violations there established (15 U.S.C. 16(a)). Moreover, an adjudication of violation here would have a direct impact upon the instant case. The trial court, despite the clear proof of violation, has denied injunctive relief because of its conclusion (Appendix A, *infra*, p. 24) that there is no "reasonable probability or likelihood" that Parke Davis will resume its illegal price-fixing attempts. However, the court refused to dismiss the complaint, as Parke Davis had urged; by merely denying the Government injunctive relief, it retained jurisdiction. If, at some future date, Parke Davis should again resume its illegal activities (either in the area involved in this case or elsewhere),* the Government would be entitled to have the benefit of an adjudication of violation, and should not be required to try the prior case all over again. Yet that may well be the effect of the court's failure to enter the adjudication of violation that the Government requested and the proof established.

There is another adverse consequence to the public if a trial court may, despite uncontradicted evidence of violation, refuse an adjudication merely because it declines to grant injunctive relief. One of the major

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* As the district court found (Appendix A, *infra*, p. 23), Parke Davis has never made any announcement to the public or to the drug trade of its asserted abandonment of its policy of attempting to maintain "fair trade" prices in non-"fair trade" areas.

factors that impel antitrust defendants to enter into consent judgments before trial is the knowledge that, if they go to trial and lose, the adjudication of violation will be available to treble damage plaintiffs. A large number of antitrust cases are settled by consent, at great saving to the Government and benefit to the public. Defendants, however, would have less inducement to enter into consent judgments if they knew that, even though they were held after trial to have violated the law, they might avoid an adjudication to that effect if the trial court was persuaded that injunctive relief was unnecessary because the violations had "ceased".

3. The power and duty of the district court to enter an adjudication of violation, where the proof at the trial establishes violation, is not dependent upon the granting of injunctive or other equitable relief. The district court's comprehensive jurisdiction and duty under Section 4 of the Sherman Act, 15 U.S.C. 4 (*supra*, p. 2) to "prevent and restrain" violations of the antitrust laws empowers and obligates it to adjudicate violation. See also 28 U.S.C. 2201. Moreover, Section 5a of the Clayton Act contemplates that judgments in Government antitrust cases will contain an adjudication "to the effect that a defendant has violated said laws." And, as we have shown, to limit the Government's right to an adjudication to cases where injunctive relief is also granted would impair the basic Congressional scheme of antitrust enforcement.

In *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632, this Court stated that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case; *i.e.*, does not make the case moot * * *. A controversy may remain to be settled in such circumstances * * *, *e.g.*, a dispute over the legality of the challenged practices." It went on to add that this "public interest in having the legality of practices settled, militates against a mootness conclusion" entitling the defendant to a dismissal, and that "[t]he courts have rightly refused to grant defendants such a powerful weapon against public law enforcement" (*ibid.*). See *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309–310. If the need for resolution of the "legality of the challenged practices" may thus survive their abandonment, it would seem *a fortiori* that, where their illegality has already been established on the record, the need for an adjudication thereof similarly survives abandonment.[1]

[1] The only judicial authority that we have found supports our position. In *United States* v. *Railway Employés' Dept., A.F.L.*, 286 Fed. 228 (N.D. Ill.), the court denied a motion to dismiss a Government civil antitrust suit on the ground that the "conspiracy charged in the bill has disappeared" and the strike had been settled on many of the railroads (p. 231). The court held that, in the light of Section 5(a) of the Clayton Act, the consequences of an adjudication of violation dictated against dismissing the action (pp. 232, 233). Cf. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 452.

CONCLUSION

The question presented by this appeal is substantial and of large public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1960.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

(Filed July 18, 1960, Harry M. Hull, Clerk)

OPINION

The above entitled matter came on for hearing, pursuant to a mandate of the Supreme Court of the United States, wherein the judgment of this Court, 164 Fed. Supp. 827, was reversed and the case remanded to this Court with directions to enter an appropriate judgment enjoining the defendant from further violations of the Sherman Act "unless the defendant elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record." 362 U.S. 29, 4 L. ed. 2d 505.

The defendant elected to submit evidence in accordance with the opinion above set out and the present hearing relates solely to the question of injunctive relief. The only witness appearing at the present hearing was the Vice President and Director of the U.S. Sales and Promotion of defendant. He had occupied that position since 1951 and had been connected with the sale of defendant's products for over

twenty-seven years. He testified that he is responsible for the carrying out of the sales policies of the defendant by reason of his office.

Clearly the witness was intimately qualified to testify concerning the probability of a resumption of prior sales practices.

His uncontradicted testimony showed the futility of those practices for the reason that a refusal by one wholesaler to sell defendant's goods to a retailer would be nullified by the fact that the products sought could be obtained from a different wholesale establishment and consequently could be sold at discount. Because of the ineffectiveness of the prior sales practice they were for sound business reasons abandoned. Thus it appears to be in the interest of good business to have terminated the sales practices of four years ago.

It also appears that due to competition with others in the same kind of business it was necessary for the defendant to meet that competition. Since highly reputable firms such as Lilly, Sharp & Dohme, Abbott, Upjohn and Squibb permitted competing products to be sold at a discount, it appears to the Court that it would have been poor business indeed not to have done as defendant acted in putting a permanent stop to the former sales practices.

The Government admits that since the time of abandonment defendant, up to the present time, has made no attempt to prevent selling its products at discount prices. Advertisements in newspapers appearing throughout that time are in evidence and demonstrate that retailers throughout the area pertinent here have been continuously selling products of the defendant at heavy discount much below the suggested minimum retail prices.

The Court has in mind that the witness here, although he may have heard of the investigation by the

Government into sales practices of defendant and had received an opinion from Company counsel that such investigation was proper, it does not necessarily follow that business methods employed in good faith should of necessity be then and there abandoned.

The witness finally states that the defendant had been compelled to stop its former sales policy sometime prior to the filing of the complaint herein. The testimony is borne out by the record.

It seems clear to the Court as a further reason for establishing the fact that the real cause for the change in business policy was based on sound mercantile common sense is that the former practice was not resumed by defendant after it had been held in the fall of 1957 in a decision by Judge Tamm of this Court in a companion suit on the criminal side that the charges resulting from the antitrust investigation were without merit.

In view of the entire record of this case it appears clear to the Court that to agree with the contentions of the Government, the Court's decision would of necessity have to be based on a finding that the defendant was and is dishonest and that despite the holding of the Supreme Court of the United States it is likely to again indulge in practices held to be unlawful and is therefore a potential law breaker.

The Court declines to so brand the defendant corporation. To do so would in effect taint the defendant with the stigma of its officers being bereft of ordinary business sense.

It is not, in the Court's opinion, the investigation by the Government that prompted the change in business policy of sales. The change was effective prior to the to the filing of the complaint herein and the Court finds nothing in the record that can properly indicate

the change was made by anything other than the market conditions that obtained and the exercise of ordinary good judgment.

FINDINGS OF FACT

The defendant having offered evidence relating solely to the issue of the propriety of injunctive relief on June 6, 1960, and the plaintiff having presented no further evidence, the Court makes the following Findings of Fact and Conclusions of Law in accordance with its oral opinion of July 5, 1960. These Findings supplement those entered by the Court on July 16, 1958. (164 Fed. Supp. 827.)

1. Prior to July 1956, the defendant Parke, Davis, in order to promote the sale of its products in non-Fair Trade areas, had sought to encourage the retail sale of its products in such areas at prices not less than the minimum retail prices suggested in Parke, Davis' catalog. In the summer of 1956 in Washington, D.C., and Virginia, Parke, Davis was confronted with a price-cutting situation such as the company had never encountered before. (Tr. 10). In response to that situation, as more fully described in the Court's Findings of July 16, 1958, Parke, Davis in July and August 1956, engaged in activity whose purpose was to discourage certain retail drugstores in Washington, D.C., and Virginia from selling and advertising Parke, Davis products at less than the suggested minimum retail prices. This activity, whose legality has been challenged in this action, was undertaken pursuant to a then existing Parke, Davis sales policy under which Parke, Davis would refuse to sell its products in a non-Fair Trade area (a) to a retail drugstore which was selling Parke, Davis products at less than the suggested minimum retail prices, and (b) to any wholesale distributor which was supplying such a

retail drugstore with Parke, Davis products. (Findings of July 16, 1958; Tr. 8–10).

2. Prior to July 1956, Parke, Davis' sales officials consulted counsel as to the legality of the foregoing sales policy and were advised that the policy was lawful. At the time the challenged price maintenance activity occurred, the responsible Parke, Davis officials, relying upon the foregoing advice of counsel, believed the activity to be lawful. (Tr. 7–18; GX 16).

3. In the fall of 1956 Parke, Davis officials came to the conclusion, on the basis of practical experience in Washington, D.C., Virginia and elsewhere, that the sales policy and activity undertaken pursuant thereto did not, and would not in the future, effectively discourage the retail sale and advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 12–13.) In the same period Parke, Davis' sales officials were advised that Parke, Davis' leading competitors were making no effort to discourage retail sales of their products at less than their suggested minimum retail prices in non-Fair Trade areas, and it thus became apparent to Parke, Davis that its sales policy, if pursued, would not only fail to accomplish its purpose but would actually subject Parke, Davis products to a competitive disadvantage. (Tr. 12–13, 18).

4. In the summer and fall of 1956 the Parke, Davis officials responsible for framing Parke, Davis' sales policies held a series of conferences at which they reviewed the consideration set forth in Paragraph 3 above. (Tr. 11–12). In January 1957, in response to these considerations, the Parke, Davis officials decided that the sales policy described above should be abandoned at once and that Parke, Davis should in the future take no action to discourage the retail sale or advertisement of Parke, Davis products at less

than suggested minimum retail prices in non-Fair Trade areas. (Tr. 12–13).

5. The considerations in favor of the abandonment of the sales policy were discussed with Parke, Davis' field personnel in December 1956. In January 1957, Parke, Davis' field personnel in non-Fair Trade areas were instructed to make no further effort to discourage retail sale of Parke, Davis products at less than suggested minimum retail prices in such areas, and these instructions have remained in effect ever since. (Tr. 12–14, 15).

6. The decision and the instructions described in paragraphs 4 and 5 above were made and given more than three months before any legal action was instituted by the plaintiff with respect to the challenged price maintenance activity. Parke, Davis' Vice President and Director of United States Sales, who was responsible for the change in policy, testified that the decision to abandon the prior sales policy and activity pursuant thereto was not prompted by the fact that the plaintiff had instituted an investigation of the challenged price maintenance activity. (Tr. 15–16).

7. At no time since January 1957, either before or after the decisions of this Court in companion Criminal Action No. 444–57 and this case, has Parke, Davis considered or taken any action to reestablish the sales policy hereinbefore described or to discourage, by refusals to sell or otherwise, the retail sale or advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 14–15, 16–17).

8. Since January 1957, Parke, Davis has regularly and continuously made sales in non-Fair Trade areas, including Washington, D.C., and Virginia, (a) to retail drugstores which were and are selling and advertising Parke, Davis products at less than suggested

minimum retail prices, and (b) to wholesale distributors who were and are selling Parke, Davis products to such retail drugstores.

9. Since January 1957, retail drugstores in Washington, D.C., and Virginia have regularly and continuously advertised Parke, Davis products for sale at less than Parke, Davis' suggested minimum retail prices and made sales according to the terms of such advertisement. (DX 1, 2, 3).

10. Parke, Davis at this time has no intention of re-establishing the sales policy hereinbefore described or of taking any action, by refusals to sell, to discourage the retail sale or advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 18).

11. In view of the ineffectiveness, competitive disadvantages, and abandonment of the prior sales policy, which was intended, but failed, to promote the sales of Parke, Davis products in non-Fair Trade areas, Parke, Davis is currently attempting to develop new methods of promoting such sales. The new promotion methods under development are based upon the assumption that Parke, Davis products will continue to be sold and advertised at less than suggested minimum retail prices in non-Fair Trade areas in the future. (Tr. 19).

12. Parke, Davis' sales to the drug firms (retail and wholesale) who were affected by the challenged price maintenance activity, which activity lasted for only two months (July and August 1956), constituted substantially less than 2% of Parke, Davis' total sales in 1956 and subsequent years. (Tr. 19–20).

13. Neither the adoption of the prior sales policy before July 1956, nor its abandonment in January 1957, was the subject of any express public announcement by Parke, Davis. (Tr. 25, 27). However, the

regular and continuous retail sale and advertisement of Parke, Davis products at less than suggested minimum retail prices in Washington, D.C., and Virginia since January 1957, has in effect served as a public announcement that Parke, Davis' products may be sold and advertised without interference by Parke, Davis. (DX 1, 2, 3).

14. The evidence as a whole and the particular facts found in Paragraphs 1–13 above demonstrate that there is now no dangerous probability, or even any reasonable probability or likelihood, that the prior sales policy, the challenged price maintenance activity, or any other activity pursuant to the policy, will in the future be resumed or undertaken by the defendant in Washington, D.C., Virginia or elsewhere.

CONCLUSIONS OF LAW

1. Since on the record as a whole the plaintiff is not entitled to the relief it seeks, and

2. In view of the Supplementary Findings of Fact and under settled principles of equity, the injunctive relief sought by the plaintiff would be unnecessary and inappropriate, it is therefore denied.

/s/ JOSEPH R. JACKSON,
Judge.

JULY 18, 1960.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

ORDER

The Court having heard the evidence on the issue of relief, and the Court having reviewed the entire record, considered the briefs of the parties and concluded that, upon the facts and the law, the Plaintiff is not entitled to the relief it seeks, it is

ORDERED that the injunctive relief sought by the Plaintiff is denied.

/s/ JOSEPH R. JACKSON,
Judge.

[Filed July 18, 1960.]